A

MALAYAN BANKING BHD

v.

GALE FORCE SDN BHD; SHAN SHUI GOLF & COUNTRY RESORT BHD (INTERVENER)

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CASE NO: K24-77-2007-I]
25 SEPTEMBER 2009

C

CIVIL PROCEDURE: *Parties - Intervention - Application to intervene to set aside vesting order - Whether failure to cite Minister of Finance fatal to application - Whether vesting order null and void on ground that there was contravention of s. 49(9)(a) Banking and Financial Institutions Act (BAFIA)*

D

The intervener's application was for an order to set aside the vesting order made by this court on 18 June 2007 which in effect validated a sale and purchase agreement dated 17 January 2007 entered into between Malayan Banking Berhad and Gale Force Sdn Bhd, whereby Malayan Banking sold to Gale Force Sdn Bhd numerous non-performing loan accounts together with the securities attached thereto and one of the non performing loan accounts was the Shan Shui Golf and Country Resort Berhad loan from Mayban Finance Berhad. The issues that arose were (i) whether the failure to cite the Minister of Finance was fatal to the application of the intervener and (ii) whether the vesting order was null and void on the ground that the transfer of the Shan Shui Loan had contravened s. 49(9)(a) of the Banking and Financial Institutions Act (BAFIA).

E

F

G

Held (dismissing intervener's application to set aside vesting order):

(1) The intervener was challenging the decision of the Minister of Finance to exempt the applicants from complying with the provisions in the BAFIA and hence not to cite the Minister would be an affront to the basic rule of natural justice. Intervener had not shown any evidence of special circumstance to allow this court to say that the failure to cite the Minister of Finance would not render this application improper. What the intervener was challenging was in fact a public decision which made this 'application by way of intervention' a judicial review of that decision. Be that as it may, the intervener should

H

I

have cited the Minister of Finance. It should not be left to the applicants to defend the action of the Minister of Finance as the decision to be quashed was his. The least the intervener could have done was to serve a copy of this application on the Minister of Finance. This had not been done, hence leaving no signal to the court as to whether the Minister of Finance was interested or disinterested in this application. (paras 10, 11, 12 & 15)

(2) Section 118(1) is clear and unambiguous in empowering the Minister to exempt any person from all or any part of the provisions of BAFIA. The only limitation to that power is the prohibition of exempting of what is provided for in ss. 96 and 97 of BAFIA. The implication of the words used in s. 118 is clear and that is the Minister can exempt any person from compliance of all but two provisions of BAFIA. Hence the exemption order issued by the Minister which waived compliance of s. 49(9)(a) was valid provided conditions in s. 118 were complied with. (para 21)

(3) The involvement of BNM was undisputed as it had on 28 December 2005 issued a guideline to allow the sale of non performing loans by local banking institutions to non-financial institutions. With this guideline, it could be taken that BNM had recommended to the Minister of Finance that he should allow sale of non performing loans as recommended by the guideline. (para 21)

(4) In the present case, what Gale Force did was to purchase from Malayan Bank, a non performing loan, no more no less. To be deemed to be involved in 'banking business', Gale Force must do all the three acts set out in s. 2. There was no evidence before this court to say that Gale Force was involved in all the three acts. That being the case, Gale Force needed no license to purchase the Shan Shui loan and the issue of contravention of s. 49(9) did not arise. (para 21)

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Genesis Force Sdn Bhd v. The Director of Lands and Survey Sarawak & Anor [2008] 1 LNS 449 HC ***(refd)***

Light Style Sdn Bhd v. KFH Ijarah House (Malaysia) Sdn Bhd [2009] 3 CLJ 370 HC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 2, 49(9)(a), 50(1), 96, 97, 118(1), (5), 125, 126

For the 1st applicant - Nicholas Fernandez; M/s Fernandez & Co
For the 2nd applicant - Saiful Azian Mokhtar; M/s Jayasuriya Kah & Co
For the intervener - Alex Siew; M/s Alex Siew & Co

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The intervener's application before me in substance is for an order to set aside the vesting order made by this court on 18 June 2007 which in effect validated a sale and purchase agreement dated 17 January 2007 entered into between Malayan Banking Berhad and Gale Force Sdn. Bhd, whereby Malayan Banking sold to Gale Force numerous non performing loan accounts together with the securities attached thereto and one of the non performing loan accounts is the Shan Shui Golf and Country Resort Berhad loan from Mayban Finance Berhad.

Background Facts

[2] Mayban Finance had granted a RM20 million bridging loan facility to Shan Shui. By an order of the High Court of Malaya, Kuala Lumpur dated 17 August 2004, Malayan Bank was vested with all the assets, contracts, rights and liabilities of Mayban Finance including the rights, powers and remedies to take or resist legal proceedings against any party.

[3] Bank Negara Malaysia (BNM) on 28 December 2005 pursuant to s. 126 of Banking and Financial Institutions Act (BAFIA) issued guidelines titled "Guidelines on the Disposal/ Purchase of Non-Performing Loans by Banking Institutions". The rationale of the guidelines is reflected in para. 2 (Part 1: Introduction) of the BNM Guidelines which states that:

> In order to enhance the range of avenues for banking institutions to effectively manage their balance sheets, banking institutions are now allowed to sell outright their non performing loans (NPLs) to eligible third parties or purchase NPLs from other banking institutions,

> subject to certain conditions. This flexibility allows banking institutions to accord greater focus towards strengthening their business potential thorough greater product innovation, higher investment in human capital and leveraging on technological enhancement, rather than managing distressed asset.

[4] Paragraph 1.1 of the guidelines allows and anticipates licensed institutions to sell their non performing loans to domestic and foreign investors who are not licensed institutions.

[5] Pursuant to the guidelines, Malayan Banking and Gale Force on 17 January 2007 entered a Sale and Purchase Agreement whereby Malayan Banking sold to Gale Force the Shan Shui Loan on the conditional precedent that approvals were obtained from BNM and the Minister of Finance as well as compliance with the BNM Guidelines.

[6] By letters dated 9 May 2007, 14 May 2007 and 17 May 2007 issued by BNM and addressed to Malayan Banking, BNM informed that the Minister of Finance had given his approval to the Sale and Purchase Agreement by way of an exercise of the Minister's powers pursuant to s. 118(1) of BAFIA in exempting a licensed institution from compliance with s. 49(9)(a) of BAFIA. The Minister of Finance's exemption was gazetted in the Government Gazette dated 10 May 2007 and cited as "The Banking and Financial Institutions (Licensed Institutions) (Disposal of Non-Performing Loans) (Exemption) Order 2007". Paragraph 3 of the "Exemption Order" expressly provides that:

> The Minister exempts a licensed institution from the application of paragraph 49(9)(a) of the Act in relation to the disposal of non-performing loans by a licensed institution to an institution not licensed under the Act provided that such disposal is made in accordance with the requirements set out in the Guidelines.

[7] In order to give effect to the said Sale and Purchase Agreement, both Malayan Banking and Gale Force made a joint application to this court pursuant to s. 50(1) of BAFIA which on 18 June 2007 granted a vesting order in respect of the sale and purchase agreement dated 17 January 2007.

[8] The intervener now comes to court to set aside the vesting order of this court on grounds set out in the affidavits of one Datuk Kuor Nam Ngum.

[9] Having read the affidavits and submissions of counsels the determinative issues before me are these:

1. Whether the failure to cite the Minister of Finance is fatal to the application of the intervener?

2. Whether the vesting order is null and void on the ground that the transfer of the Shan Shui Loan had contravened s. 49(9)(a) of the BAFIA?

Issue 1

Whether The Failure To Cite The Minister Of Finance Is Fatal To The Application Of The Intervener?

[10] Counsel for Gale Force submits that what the intervener is challenging is the decision of the Minister of Finance to exempt the applicants from complying with the provisions in BAFIA and hence not to cite the Minister would be an affront to the basic rule of natural justice. He also cites the case of *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551, where the Court of Appeal held that:

> In cases where a declaration is sought for, except in very exceptional circumstances, all persons interested should be made parties, whether by representation or otherwise. No such special circumstances exist in the instant case. The failure to add Thomas as a co-defendant to the main action and the failure to add Tunas Murni as a respondent to the appeal were serious impediments that stood in the way of the appellant's success before this Court. Clearly, the success or failure of the appellant's case depends very much upon whether he can make out the case alleged against Thomas. The non-joinder of Thomas must therefore be fatal to the action.

[11] I am bound by the decision of the Court of Appeal which leaves me with no option but to apply the principle of law stated there by asking 'is there any special circumstance' which would lead me to hold the view the intervener's failure is not fatal. With respect, counsel for intervener had not shown any evidence of special circumstance to allow me to say that the failure to cite the Minister of Finance would not render this application improper.

[12] Let me also add that what the intervener is challenging is in fact a public decision which in my view makes this 'application by way of intervention' a judicial review of that decision. Be that as it may, the intervener in my view should have cited the Minister of Finance.

[13] I had dealt with a similar argument in *Genesis Force Sdn Bhd v. The Director of Lands and Survey Sarawak & Anor* [2008] 1 LNS 449 HC and this is what transpired:

> Many issues were raised by counsels in their submissions but Mr. Alvin Chong, counsel for the 1st Respondent suggested that the Court should firstly consider the issue of whether the Applicant had sued the right party in that the 1st Respondent was not the 'decision maker' of the decision sought to be impugned. I find merit in that suggestion as the Applicant first need to cross this threshold. As pointed out by Lord Diplock in Council of *Civil Service Unions v. Minister for the Civil Service* [1985] 5 AC 374 at p. 408:
>
> > Judicial Review, now regulated by RSC, Ord. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or 20 body of persons) whom I will call "decision maker" or else the refusal by him to make a decision.
>
> Hence the threshold issue is "who was the decision maker in rejecting the Applicant's application for the renewal of the GPL and the issuance of the mining certificates".
>
> In respect of the renewal of the GPL and the issuance of Mining License, the relevant sections in the Mining Ordinance are Section 10(1) and 48(3) which reads respectively as follows:
>
> > 10(1) When any application has been approved by the Yang di-Pertua Negeri and the applicant desires to commence mining operations before the survey can be completed and the mining lease issued, it shall be lawful for the Superintendent to issue to the applicant a mining certificate, to be prepared in duplicate, in the form in the Second Schedule, having thereon a sketch plan of the land, and such applicant may then enter upon, occupy and mine the land therein described in accordance with the terms of the mining certificate.

> 48(3) If, before the expiration of the period of any prospecting license, the licensee shall prove to the satisfaction of the Yang di Pertua Negeri that he has good and sufficient reason for not having completed the work of prospecting, the period of such license may, upon application by the licensee, be extended by Yang di Pertua Negeri in respect of the whole or any part of the area comprised therein for such period as may be necessary to permit the licensee to complete his work of prospecting. Such extension hall be effected by endorsement on the license under the hand of the Yang di Pertua Negeri, and such fee as the Yang di Pertua Negeri shall determine shall be paid in respect thereof.

From the two provisions it is crystal clear that the approving authority for renewal of GPL and the issuing of mining certificates is the Yang di-Pertua Negeri who is defined in Section 3(1) of the Interpretation Ordinance, 2005 Chapter 61 as follows:

> Yang di-Pertua Negeri means the Yang di Negeri of the State of Sarawak appointed by the Yang di-Pertuan Agong under Article 1(1) of the State Constitution and shall, in the exercise of his functions, act in 5 accordance with the advice of the Majlis Mesyuarat Kerajaan Negeri or of a member of it acting under the general authority of the Majlis, except as otherwise provided by the Federal Constitution or by the State Constitution, and includes any person appointed under Article 1(3) of the State Constitution to exercise temporarily the functions of the Yang di-Pertua Negeri.

By that definition the relevant authority, in my view, would be the Minister of Planning and Resource Management, who unfortunately is not a party to the Judicial Review. The 1st Respondent is not and cannot be a substitute to the Minister. In fact it was made known to the Applicant that the approving authority via a letter from the 1st Respondent, dated 18th April, 2007 which specifically stated that "the application for the renewal of expired GPL No. 10D/GPL/01/2005 and the issuance of Mining Certificate for Area 9, 10, 11, 12, 13, 14, 15 and 16 within the expired GPL is still under consideration by the Ministry of Planning and Resource Management.

Accordingly I am left with no choice but to and do hereby dismiss this Judicial Review with costs.

[14] Similarly here, the Minister of Finance should be cited to appear. It should not be left to the applicants to defend the action of the Minister of Finance as the decision to be quashed is his. I

am fully aware of the argument of counsel for the intervener and that is this application involves purely on interpretation of provisions of an Act which only concerns legal issues.

[15] Attractive as this argument may be, but to sustain it would amount to conducting a trial in absentia which I am not willing to do so as the implication of this application is far reaching as the Minister of Finance had exempted numerous transactions in the country. The least counsel for the intervener could have done is to serve a copy of this application on the Minister of Finance. This has not been done, hence leaving no signal to the court as to whether the Minister of Finance is interested or disinterested in this application.

[16] Accordingly I uphold the contention of the counsel for the applicants and dismiss the intervener's application with costs.

[17] However in the event that I am wrong in my decision, I will deal with the issue No 2.

Issue 2

Whether The Vesting Order Is Null And Void On The Ground That The Transfer Of The Shan Shui Loan Had Contravened Section 49(9)(A) Of The Bafia?

[18] Section 49(9)(a) provides as follows:

> 49. Sanction required for reconstruction, etc. of licensed institution
>
> (9) An application under:
>
> (a) subsection (1)(b) (for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution] shall not be recommended by the Bank (Bank Negara) for approval and shall not be approved by the Minister (Minister of Finance) where the agreement or arrangement would result in the sale, disposal, or transfer howsoever, of any part of the business of the licensed institution to any person which is not a licensed institution, except in relation to a part of the business, being a part which does not require to be licensed under this Act …

[19] The other relevant section is s. 118 BAFIA which reads as follows:

A Exemptions. 118. (1) The Minister may, on the recommendation of (Bank Negara):

(a) in consideration of the special circumstances relating to the constituent documents of any particular person, or of any class, category or description of persons, and the nature of the
B business carried on by such particular person, or by such class, category or description of persons; and

(b) if he is satisfied that it would not be:

(i) prejudicial to the promotion of a sound financial structure
C in Malaysia; and

(ii) contrary to the public interest to do so, by order published in the Gazette exempt such particular person, or such class, category or description of persons, from all or any of the provisions of this Act.
D

... (5) Nothing contained in this section shall empower the Minister to exempt any person from section 96 or 97.

[20] The contention of the intervener is succinctly set out by
E counsel in his reply submission in paras. 7 - 12 which for convenience I set out in verbatim:

7. Section 49(9)(a) is an express and absolute prohibition imposed by an Act of Parliament against any transaction caught under Section 49(9)(a), with Bank Negara prohibited
F from recommending to the Minister and the Minister prohibited from approving, any such transaction.

8. Section 118 is a provision allowing the Minister to exempt entities regulated under BAFIA (see Section 118(1)(a)) from certain provisions of BAFIA, upon the recommendation of
G Bank Negara and the fulfillment of the conditions precedent outlined in Section 118.

9. Nothing in Section 118 gives the Minister the power to exempt the Minister himself or any other parties from the express and absolute prohibition contained in Section 49(9)(a).
H

10. Furthermore, under Section 118, the Minister's power to grant an exemption is expressly conditional upon a recommendation of Bank Negara. Section 49(9)(a) expressly prohibits Bank Negara from making any recommendation to
I the Minister in respect of a transaction prohibited under Section 49(9)(a). Thus Section 118 is a non-starter.

11. As the effect of the Exemption Order is that the Minister is purporting to approve a transaction which the Minister is prohibited from approving under Section 49(9)(a), the Exemption Order is clearly *ultra vires* Section 49(9)(a) and as such, null and void. A

12. In so far the Exemption Order is purported to be issued under Section 118 when there is no such power under Section 118 for such an exemption to be issued, the Exemption Order is also *ultra vires* Section 118. B

[21] Having considered the views of the three counsels, I am of the view that the contention of the counsel for the intervener though neatly packaged is incorrect and my reasons are these: C

1. Section 118(1) as pointed out by counsel for the applicants is clear and unambiguous in empowering the Minister to exempt any person from all or any part of the provisions of BAFIA. The only limitation to that power is the prohibition of exempting of what is provided for in s. 96 and 97 of BAFIA. The implication of the words used in s. 118 is clear and that is the Minister can exempt any person from compliance of all but two provisions of BAFIA. Hence the Exemption Order issued by the Minister which waives compliance of s. 49(9)(a) is valid provided conditions in s. 118(1) are complied with. D E

2. The involvement of BNM is undisputed as it had on 28 December 2005 issued a guideline titled "Guidelines on Deposit/Purchase of Non-Performing Loans by Banking Institution" to allow the sale of non performing loans by local banking institutions to non financial institutions. With this guideline it can be taken that BNM had recommended to the Minister of Finance that he should allow sale of non performing loans as recommended by the guideline. F G

3. There is no clear intention by Parliament to signify that s. 49(9) is to override s. 118(1). In fact the contrary intention appears with the presence of s. 118(5) which prohibits any exemption only to s. 96 and 97. As rightly pointed out by counsel for Gale Force, if the intention is to have s. 49(9) override s. 118, s. 49(9) would be included in s. 118(5). H

4. In any event, s. 49(9) in my view does not apply to sale of the Shan Shui loan. My reason for saying this is that s. 49(9) contains an exception which reads as follows: I

A

> ... except in relation to a part of the business, being a part which does not require to be licensed under this Act

What is required to be licensed under BAFIA is a company operating a banking business which is defined in s. 2 of BAFIA. This definition is discussed by Rohana J in *Light Style Sdn Bhd v. KFH Ijarah House (Malaysia) Sdn Bhd* [2009] 3 CLJ 370 HC and this is what her Ladyship said at pp. 380-381:

B

C

D

E

F

G

H

I

> From the above definition, a person is carrying out Banking Business only if he is in the business of receiving deposits, paying and collecting cheques drawn by customer and providing financing or such other business prescribed by the Minister. Thus, Banking Business entails the acts of all these three transactions and not just any one of them. From the wordings of s. 2 all the three limbs must be read conjunctively and cannot be read disjunctively as suggested by Encik P.S. Gill. Therefore, if a person is providing only one of the businesses under the three limbs in s. 2, say merely providing financing as in this case, but not collecting deposit, such activity would not be sufficient to constitute Banking Business under this definition. It follows that, even if it is true that the defendant is providing financing in the Murabaha Sale Agreement, the provision of financing per se by the defendant is not a Banking Business and requires no license under s. 6(4) BAFIA. Section 6(4) requires 25 licensing only if a person is carrying out, banking business, finance company business, merchant banking business or discount house business.
>
> All these businesses are clearly defined in s. 2 BAFIA.
>
> It is to be noted that even the definition of 'finance company business' in s. 2 entails receiving of deposit and provision of credit, leasing, hire purchase or acquiring rights and interest in hire purchase. In my view there is therefore no basis to say that the defendant has contravened any of the provisions in BAFIA in the transaction with the plaintiff.
>
> Even if I am wrong in my above finding and even if it can be argued that the transaction undertaken by the defendant is prohibited by BAFIA, I agree with the argument by Encik Sivaguru that s. 125 BAFIA would have saved the agreement. Section 125 provides that an agreement in contravention of any provision of BAFIA cannot be avoided solely by reason of such contravention. Section 125 provides as follows:

> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in contravention of any provision of this Act shall be void solely by reason of such contravention.

Thus, notwithstanding any contravention of any provision in BAFIA, s. 125 would have saved the Murabaha Sale Agreement. The Supreme Court had held that a contract made in contravention of s. 45 BAFIA was saved by s. 125 in the case of *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369. This is because according to the Supreme Court, s. 45 does not declare that an agreement made against that section is void. Likewise, there is also no such provision to declare that an agreement made in contravention of s. 4 is null and void or illegal.

In *RHB Sakura Merchant Bankers Bhd v. Tan Sri Dato' Ting Pek Khiing (No. 1)* [2004] 2 MLJ 315 the High Court followed the decision in Coramas Sdn Bhd on this point.

In the present case what Gale Force did was to purchase from Malayan Bank, a non performing loan, no more no less. To be deemed to be involved in 'banking business', Gale Force must do all the three acts set out in s. 2. There is no evidence before me to say that Gale Force is involved in all the three acts. That being the case Gale Force needs no license to purchase the Shan Shui loan and the issue of contravention of s. 49(9) does not arise.

I also agree with her Ladyship that if there is in fact a breach of s. 49(9), s. 125 would have saved the purchase of the Shan Shui loan.

[22] Accordingly I dismiss the intervener's application to set aside the vesting order with costs to be taxed unless agreed to the applicants.